

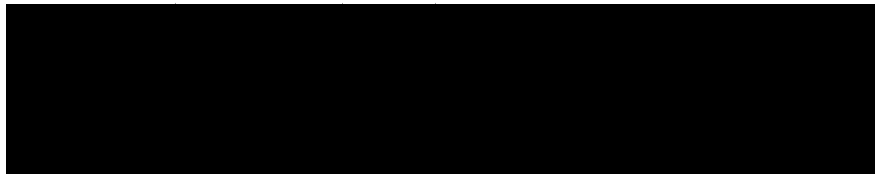
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U.S. Department of Homeland Security
20 Mass. Ave. N.W., Room A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



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FILE: LIN 03 072 52979

Office: NEBRASKA SERVICE CENTER

Date: JAN 03 2005

IN RE:

Petitioner:

Beneficiary:



PETITION:

Petition for a Nonimmigrant Worker pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

For Michael T. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be dismissed.

The petitioner owns a regional chain of convenience and grocery stores. It seeks to employ the beneficiary as a district store manager. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The director denied the petition because the beneficiary did not meet the qualifications for the proffered position. The AAO affirmed the director's decision while noting, "implicit in the director's denial letter is his conclusion that the proffered position is a specialty occupation."

On motion, counsel states that the AAO erred in rejecting the expert opinions of three evaluation agencies that each determined the beneficiary's foreign degree and work experience combined are equivalent to a U.S. bachelor's degree in business administration. Counsel proffers evidence not previously submitted from a university affirming the authority of one of its professors to grant college-level credit in the specialty.

Counsel's motion to reconsider is without merit. Counsel does not state reasons for the AAO to reconsider its decision nor does he cite any precedent decisions in support of a motion to reconsider. A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Counsel's assertion that the AAO should give "credence" to evaluation agencies is unsupported and lacks a legal basis. The motion to reconsider will thus be denied.

The AAO will also deny counsel's motion to reopen. A motion to reopen must state new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). In this case, the petitioner submitted a Florida International University professor's written opinion the AAO considered in its November 22, 2003 decision. On motion counsel has now attached two letters from the university purporting to affirm the professor's credit-granting authority. Those two letters, which predate the AAO's decision, were presumably available to counsel prior to the decision.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a fact is not new if available and open to discovery in time to present during the previous proceeding. A motion to reopen must also state the new facts that will be proven if the matter is reopened, and must be supported by affidavits or other documentary evidence. Generally, the new facts must be material and unavailable previously, and could not have been discovered earlier in the proceeding. *See* 8 C.F.R. § 1003.23(b)(3). Here, the motion refers to facts previously available to counsel. Accordingly, this evidence is not now "new" for the purpose of a motion to reopen.¹

¹ In passing it should be noted that counsel's submission of the university letters, on motion, does not affirm

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is dismissed. The previous decision of the AAO, dated November 22, 2003, is affirmed. The petition is denied.

the professor's credit-granting authority, but instead shows that the university no longer has "a *program* for granting such credit," as required by 8 C.F.R. § 214.2(iii)(D)(1). The May 21, 2002 letter states the university "had discontinued the practice of granting credit based on life experience." The professor's "advisory authority" to waive a required College of Business Administration course for students entering his department does not qualify as a program for granting college-level credit. As the AAO previously stated, the professor's "evaluation is, therefore, of little evidentiary value."